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No. 02-1062

IN THE

Supreme Court of the United States

CITY OF WHITE PLAINS,

Petitioner,

v.

TCG NEW YORK, INC., TC SYSTEMS, INC., and TELEPORT COMMUNICATIONS dba TCNY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 47 U.S.C. § 253(a) preempts only those state and local legal barriers to entry that absolutely exclude a telecommunications carrier from the market.

2. Whether a court may analyze a municipal ordinance as a whole in determining whether it creates a barrier to entry that is preempted under 47 U.S.C. § 253(a).

3. Whether it is competitively neutral and nondiscriminatory for a municipality to create a structural pricing advantage for incumbents in head-to-head competition with new entrants by demanding that a new entrant (but not the incumbent) pay a franchise fee of 5% of its gross revenues to the municipality.

4. Whether a municipal ordinance that grants city officials unfettered discretion to deny franchises to new entrants on any "public interest" factor unrelated to right-of-way management or fair and reasonable right-of-way compensation is consistent with 47 U.S.C. § 253(c), when no such rule applies to incumbents.

5. Whether a municipal ordinance that grants city officials unfettered discretion to prohibit corporate or franchise transfers by new entrants for reasons not limited to right-of-way management or fair and reasonable right-of-way compensation is consistent with 47 U.S.C. § 253(c), when no such rule applies to incumbents.

STATEMENT REQUIRED BY RULE 29.6

There are three respondents – TCG New York, Inc., TC Systems, Inc., and Teleport Communications d/b/a TCNY – which collectively will be referred to in this brief as "TCG." Respondent Teleport Communications d/b/a TCNY, a New York general partnership, is owned by TC New York Holdings, Inc. (2.7%) and TC New York Holdings II, Inc. (97.3%), both of which are 100% owned by Teleport Communications Group Inc. Respondents TCG New York, Inc. and TC Systems, Inc. are also 100% owned by Teleport Communications Group Inc., which is 100% owned by AT&T Corp. No other publicly held corporation owns more than 10% of AT&T's stock.

All parties to the proceeding are listed in the caption of the case.

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INTRODUCTION

The petition for certiorari filed by the City of White Plains ("City" or "Petitioner") presents no issue worthy of this Court's review. There is no circuit split that can be resolved by review of the judgment below; this case is not a proper vehicle for deciding most of those issues; and the decision of the United States Court of Appeals for the Second Circuit was indubitably correct. Indeed, the only way the City can challenge this decision is by misstating or steadfastly ignoring the facts which are undisputed and which were stipulated. This Court should deny the petition.

STATEMENT OF THE CASE

A. Legislative Background

In the landmark Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "Act" or the "1996 Act"), Congress "ended the longstanding regime of state-sanctioned monopolies" in local phone service. *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). The Act creates "'a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services ... by opening all telecommunications markets to competition.'" *Sprint Spectrum L.P.* v. *Willoth*, 176 F.3d 630, 637 (2nd Cir. 1999) (omission in original) (quoting H.R. Conf. Rep. No. 104-458, at 113 (1996)); *Public Util. Comm'n of Tex.*, 13 F.C.C.R. 3460, 3461 (¶ 1) (1997) ("*Texas Preemption Order*"), *petition for review denied*, 164 F.3d 49 (D.C. Cir. 1999).

"The 1996 Act both prohibits state and local regulation that impedes the provision of 'telecommunications services,' § 253(a), and obligates incumbent carriers to allow competitors to enter their local markets, § 251(c)." *Verizon Communications, Inc.* v. *FCC*, 122 S. Ct. 1646, 1662 (2002)

(footnote omitted). This case concerns the first of these statutory provisions. Entitled "Removal of barriers to entry," section 253 provides that no state or local statute, regulation, or legal requirement "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). "Through this provision, Congress sought to ensure that its national competition policy for the telecommunications industry would indeed be the law of the land and could not be frustrated by the isolated actions of individual municipal authorities or states ...." *Texas Preemption Order* at 3463 (¶ 4).

Congress exempted from the general proscription of section 253(a) two kinds of regulatory actions. See *id.* at 3481 (¶¶ 43-45). First, in section 253(b), Congress preserved the authority of the States "to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." 47 U.S.C. § 253(b). Second, in section 253(c) – the provision at issue here – Congress more narrowly preserved the authority of state or local governments "to manage the public rights-of-way" and "to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government." *Id.* § 253(c).

Thus, section 253 was designed to level the competitive playing field previously monopolized by incumbent local exchange carriers – such as Verizon – by requiring that any state or local regulation of right-of-way access henceforward be "competitively neutral" and "nondiscriminatory." *Id.* § 253(b), (c). By so limiting state and municipal power, "'Congress intended primarily for competitive markets to

determine which entrants shall provide telecommunications services demanded by consumers,'" and sought to preclude an obstructionist "'third tier'" of municipal regulation that would raise the cost of entry and distort the market in favor of certain carriers. *TCI Cablevision of Oakland County, Inc.*, 12 F.C.C.R. 21396, 21440, 21441 (¶¶ 102, 105) (1997); *City of Auburn* v. *Qwest Corp.*, 260 F.3d 1160, 1175-76 (9th Cir. 2001), *cert. denied*, 534 U.S. 1079 (2002).

B. The Stipulated Facts Below

This case was decided on stipulated facts. The actions of the City of White Plains epitomize the very abuses that section 253 was enacted to prevent. The City here sought to extract tribute from new entrants but not from politically powerful incumbents like Verizon. The stipulated facts are ignored in the Petition, for they illustrate that this case does not present the questions that the City has framed. In particular, despite the misleading impression that the City attempts to create, it is not the case that only a few months passed between TCG's request for right-of-way access and this lawsuit. Pet. 10-11. As both the court of appeals and the district court concluded, there were "extensive delays in processing TCG's request for a franchise," and the combinations of these delays and the onerous requirements imposed on TCG "effectively prohibited" it from providing telecommunications services in White Plains. Pet. App. 15a, 39a ("the regulations coupled with the City's long delay in moving forward with the approval process have effectively prohibited TCG from providing telecommunications services in White Plains"). Moreover, the stipulated facts demonstrate that the City's differing treatment of TCG and the incumbent monopolist Verizon was the antithesis of competitive neutrality.

1. TCG's Franchise Negotiations

TCG provides telecommunications services in competition with (among others) incumbent local exchange carriers like

Verizon. It does so primarily by constructing and operating its own fiber optic networks. TCG first requested permission to install facilities in the City's right-of-way in January, 1992, and it made formal applications in 1992 and 1994, "regularly communicating with City representatives in an attempt to obtain the City's consent." Pet. App. 29a. The City demanded that TCG enter into a franchise agreement modeled on agreements it had negotiated with other carriers that, among other things, demanded a franchise fee of 5% of gross annual revenues from operations in White Plains. Because the City remained steadfast in its demands as the parties negotiated over agreement terms, TCG was continually denied access to the City's rights-of-way both before and after the Act was passed in February, 1996.

On December 1, 1997, the City enacted an ordinance entitled "Telecommunications Franchising and Licensing" ("Ordinance") in response to the Act's passage. Pet. App. 1b. The central provision of the Ordinance is section 2-1-01, which provides that "[n]o person shall use or occupy the streets as a telecommunications provider, or construct, operate or maintain equipment in the streets used to provide telecommunications, without a franchise or revocable license granted by the city." *Id.* at 5b. Under the Ordinance, both a franchise and a revocable license authorize a telecommunications provider to occupy and use the streets, but the latter is issued only when the occupation or use does not exceed 2,500 linear feet or does not involve the offering or provision of telecommunications service to any person within the City. *Id.* at 4b, 14b. The Ordinance provides that a prospective provider submit a formal application and negotiate terms of a franchise agreement with City officials, subject to approval by the City council. *Id.* at 7b-13b.

The Ordinance imposes many requirements that have nothing to do with management, or compensation for use, of the City's streets. For example, the Ordinance requires applicants to submit a description of the telecommunications

services that they propose to provide. Pet. App. 7b. The City has since *stipulated* that this information "is not directly related to the applicant's physical occupation of the public rights-of-way." C.A. App. A-184. Moreover, the Ordinance grants the Council unfettered discretion to deny franchises based on "the public interest, consistent with applicable law," and to weigh "[a]ny other public interest factors or considerations that the city has a lawful right to consider and that are deemed pertinent by the city for safeguarding the interests of the city and the public." Pet. App. 10b.

The Ordinance provides that a separate franchise ordinance or agreement "shall address" certain subjects, many of which again are not limited by their terms to right-of-way management – such as recordkeeping and inspection obligations, transfer restrictions, and "[s]uch other provisions as the city determines are necessary or appropriate in furtherance of the public interest, consistent with applicable law." Pet. App. 11b-13b. The Ordinance also requires that the franchise address the compensation to be paid the City, but does not specify a formula or rate of compensation, thus leaving that to be negotiated. *Id.* at 11b. The Ordinance grants the City absolute discretion to discriminate in favor of the incumbent, permitting city officials "[t]o the extent permitted by law, [to] determine to apply all or certain provisions of this Ordinance to Telecommunications Providers and Franchises and other right-of-way authorizations existing on the effective date of this Ordinance." C.A. App. A-471.[1]

Negotiations of a franchise agreement between TCG and the City continued after the passage of the Ordinance, and it is on these negotiations that the court of appeals relied. Pet. App. 4a. In April of 1998, TCG submitted an application for

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[1] The City omits this legal sanction to discriminate among telecommunications providers in reproducing the Ordinance in Appendix B of its Petition. *See* Pet. App. 1b-15b.

a revocable license, which the City never acted upon. *Id.*; C.A. App. A-185-86.

In June, 1998, the City's Corporation Counsel advised TCG that it should apply for a franchise rather than a license, and forwarded a copy of the City's recent franchise agreement with Metromedia Fiber Networks, Inc. ("MFN"). C.A. App. A-186-87. Despite the 1996 Act's preemption of municipal regulatory authority, the MFN Agreement that the City proposed as a basis for negotiations was not materially different from the City's franchise agreements antedating the Act. Cf. *id.* at A-382-428. The Counsel characterized franchise agreements as "'business deals'" between the City and the carriers. *Id.* A-187.

In August of 1998, TCG provided comments on the MFN agreement as a basis for negotiations, but expressly reserved its right to challenge the lawfulness of the Ordinance and proposed agreement under the 1996 Act and state law. C.A. App. A-187. As the City delayed action, TCG continued to press for access to the right-of-way because it was losing business opportunities with major potential customers like Pepsi and IBM. *Id.* at A-189. On February 10, 1999, TCG again submitted an application for a franchise to the City. *Id.* at A-190. Negotiations over draft agreements continued, but the City took the position that its franchise fee should be calculated not on TCG's gross revenues, but on the combined gross revenues of TCG and its affiliate AT&T. *Id.* at A-191, A-193. On May 4, 1999, the City presented a draft franchise agreement between the City and TCG ("May Proposal") that reflected the City's demands. *Id.* at A-194. It was stipulated below that TCG cannot construct telecommunications facilities in the City's public rights-of-way, or offer or provide telecommunications services in the City, because of the City's franchise requirements. *Id.* at A-189 ¶ 70.

2. The City's Decision Not To Require A Franchise, Or Impose Franchise Fees Or Restrictions, On Verizon

Even as it denied TCG entry into the White Plains market by requiring a franchise with prohibitive terms and fees, the City steadfastly refused to apply the Ordinance to TCG's principal competitor, Verizon, or to impose remotely comparable franchising requirements upon it. The City refused to do so even though the Ordinance unequivocally covered Verizon, for the central prohibition of the Ordinance is that "[n]o person shall use or occupy the streets as a telecommunications provider, or construct, operate or maintain equipment in the streets used to provide telecommunications, without a franchise or revocable license granted by the city." Pet. App. 5b. In reliance on the Ordinance provision allowing it unfettered discretion to exempt carriers of its choice, the City has not required Verizon to obtain a franchise in order to occupy the municipal right-of-way or to provide telecommunications services in White Plains. The City also has not required Verizon to pay any franchise fee, much less 5% of its gross revenues (or those of its affiliates) from its operations in White Plains. C.A. App. A-198, A-200.

Verizon has by far the largest network of poles and underground conduit in White Plains of any telecommunications provider. C.A. App. A-201. Beginning in 1919, Verizon began providing the City with free conduit for various municipal communications needs (including police and fire communications and traffic control). *Id.* at A-198, A-201. The City constructed a fiber optic network in the early 1990's for municipal uses. *Id.* at A-201. Eleven miles of the City's 31-mile network is located in Verizon conduit. *Id.* The majority (perhaps 75%) of that conduit, and a much higher percentage of conduit underlying the main thoroughfares, was built prior to 1990; many of the later

additions were in outlying areas or in short sections. *Id.* at A-199.

The City stipulated that it has never calculated the value to it of the conduit that Verizon provides, or the cost of constructing (or leasing) the same amount of conduit. C.A. App. 199. It further stipulated to no knowledge of the original or incremental cost to Verizon of providing or maintaining that conduit, or of the depreciated value to Verizon of the conduit. *Id.* There is nothing unique about the facilities Verizon has placed in the right-of-way; they are the same as other carriers use, and (other things being equal) Verizon's installation of facilities and occupation has an impact on the right-of-way no different from that of other carriers. Indeed, the City admitted it has never compared the difference in impact on the rights-of-way of Verizon vis-à-vis other carriers, even though it acknowledged that the life of its streets was impaired when Verizon constructed its network. *Id.* at A-199-201.

Verizon receives other preferences from the City as well. The City has a Street Cut Ordinance requiring telecommunications providers to obtain and maintain insurance, and to provide a monetary deposit (10% of which the City retains as a fee). The City does not require Verizon to obtain and maintain insurance or to deposit any money, and extracts no fees for its construction in the right-of-way. C.A. App. A-200-01.

The City maintains before this Court that the City entered into a "regulatory compact" with Verizon that had "a heavy universal service component," by which "[i]n return for access to the City's rights-of-way, the company undertook an obligation to extend telephone service to the taxpayers of the City." Pet. 24-25. That is a fiction; the claimed compact is no part of the stipulated facts and could not be considered in any event; and it is wrong as a matter of law. See *infra* at 23. Indeed, the City Council minutes in the record (from 1919 and 1954) reflect that the only *quid pro quo* for Verizon's

access to the City's rights-of-way was the provision of free conduit space for the City's police and fire communications systems and (at the time) discounted rates on municipal service. C.A. App. A-1149-53.

C. Proceedings Before The District Court

Because the City's May Proposal established the futility of further discussions, on June 18, 1999 TCG filed an action for declaratory and injunctive relief against the City in the United States District Court for the Southern District of New York. The complaint alleged violations of state and federal law and challenged various provisions of the Ordinance and of the May Proposal, and their discriminatory application to TCG but not Verizon. After the district court directed the parties to attempt to settle their differences, the City proposed a new agreement (the "August Proposal") that eliminated only certain of the offensive provisions of the prior proposed agreement. Pet. App. 5a-7a; *id.* at 1d-13d.

Based on the stipulated facts, the district court ruled that some (but not all) of the challenged provisions of the Ordinance and the August Proposal violated federal law. Addressing first TCG's claims under the 1996 Act, the district court held that

> the question of whether the City's actions violate § 253 of the [Act] involves a two-step analysis: (i) whether the City's regulations "prohibit or have the effect of prohibiting" the ability of TCG to provide telecommunications services under § 253(a), and (ii) if so, whether they are "saved" under § 253(c).

Pet. App. 36a. Adopting the statutory interpretation of the FCC, *Petition of the State of Minn.*, 14 F.C.C.R. 21697, 21704 (¶ 11) n.26 (1999), the district court imposed upon TCG the burden of proving that the City had violated section 253(a), whereupon the burden would shift to the City to justify its actions as within section 253(c). Pet. App. 40a n.5.

The district court held that "[a]ny process for entry that imposes burdensome requirements on telecommunications companies and vests significant discretion in local government decisionmakers to grant or deny permission to use the public rights-of-way has the effect of prohibiting service." Pet. App. 38a (internal quotation marks omitted). The district court held that TCG had satisfied its burden of proving a violation of section 253(a) because "the regulations coupled with the City's long delay in moving forward with the approval process have effectively prohibited TCG from providing telecommunications services in White Plains." *Id.* at 39a.

In regard to requirements other than fees, the district court held that all but three of the challenged provisions exceeded the "circumscribed scope of activities," Pet. App. 43a, that the FCC had identified as within municipal authority to manage public rights-of-way under section 253(c). *Id.* at 43a-52a. The district court, however, upheld the franchise fee of 5% of the gross revenues of TCG and its affiliates (including AT&T), as well as certain minimum franchise fee and in-kind requirements, as "fair and reasonable compensation" and "competitively neutral and nondiscriminatory" under section 253(c), even though Verizon was not required to pay any fees at all. *Id.* at 53a-63a.

D. Proceedings Before The Court Of Appeals

TCG appealed, and the City cross-appealed, and the FCC participated as *amicus curiae*. Before discussing the Second Circuit's decision, it is necessary to point out that petitioner misrepresents the nature of the FCC's participation. Petitioner discloses only that the FCC filed a supplemental brief in response to a request for its views by the court of appeals after argument, Pet. 11, and claims that the FCC in that brief "'respectfully refrain[ed]' from answering the Court's third post-argument question (Pet. App. at 2c) on the meaning of the terms 'competitively neutral and nondiscriminatory.'" Pet. 15-16. Petitioner makes this claim

to suggest to the Court that "the lower courts will not receive instruction in these matters from any source other than this Court." *Id.* at 15.

Petitioner's claim is false. On June 12, 2001, prior to oral argument and within the normal time required for submission of *amicus* briefs, the FCC filed on its own volition a 19-page *amicus* brief – never disclosed by Petitioner – arguing that the court of appeals "should reverse the district court's holding that the franchise fee imposed on competitive local exchange carriers and not on the incumbent is *competitively neutral and nondiscriminatory*, and should hold that this requirement is preempted under section 253 of the Communications Act." Brief of the Federal Communications Commission And The United States As *Amici Curiae* at 19, *TCG N.Y., Inc.* v. *City of White Plains*, 305 F.3d 67 (2d Cir. filed June 12, 2001) ("Initial FCC Br.") (emphasis added). Precisely because the FCC had argued in detail why the City's requirements violated the competitive neutrality and nondiscrimination standard of section 253(c), the Second Circuit after argument (on January 29, 2002) addressed three additional sets of questions to the FCC. Two of the questions concerned agency jurisdiction, while the third dealt with the separate requirement of section 253(c) that any compensation demanded for right-of-way access be "fair and reasonable." See Pet. App. 1c-2c (seeking guidance on the meaning of this standard "wholly apart from whether the fee is 'competitively neutral and nondiscriminatory'"). Contrary to the City's representation, it is this third set of questions on the meaning of "fair and reasonable compensation" in section 253(c) – not on the competitive neutrality and nondiscrimination issues raised in this petition, which the FCC had already briefed – upon which the FCC in its supplemental brief refrained from taking a definitive position until it "completed the pending proceedings on rights-of-way management" in which that issue might be decided. Supplemental Brief of the Federal Communications Commission And The United States As

Amici Curiae at 10, *TCG N.Y., Inc.* v. *City of White Plains*, 305 F.3d 67 (2d Cir. filed Mar. 11, 2002).

On the merits, the Second Circuit ruled in favor of TCG and invalidated all the challenged provisions of the Ordinance and the August Proposal. The Second Circuit decided *sua sponte* that it need not dismiss the case on the basis of the FCC's possible primary jurisdiction. Pet. App. 9a-12a. On the issue of whether the franchise violated section 253(a), the Second Circuit expressly adopted the FCC standard: namely, that a state or local law is unlawful if it "'materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.'" *Id.* at 15a (quoting *California Payphone Ass'n*, 12 F.C.C.R. 14191, 14206 (¶ 31) (1997), *available at* 1997 WL 4000726). The court held that certain provisions of the franchise – such as the right of the City to reject any application based on public interest factors – amount to a right to prohibit service, even if the City could waive that right. It also held that the long delays in the franchise process prohibited TCG from providing service. *Id.*

The court of appeals then turned to whether any of the individual provisions of the Ordinance or the August Proposal were saved by section 253(c). On the franchise fee, the court of appeals declined to reach the question of whether a fee of 5% of the gross revenues of the carriers and its affiliates was "fair and reasonable compensation" for use of the right of way. Pet. App. at 16a-20a. The court instead held that the 5% fee, and the other compensation requirements, were not "competitively neutral and nondiscriminatory" because the City did not impose them on Verizon. The Second Circuit held that the competitive neutrality of fees had to be determined based on the future costs of providing services, not sunk costs incurred in the past. Verizon's provision of free existing conduit where the costs are sunk (and presumably long recovered in the rate base) did not count. It was not competitively neutral for the City to grant Verizon a

structural pricing advantage in its franchise fee requirements. The Second Circuit emphasized that section 253(c) did not require identical fees for all competitors. A city could consider costs of the providers' different uses of the rights-of-way and scale of use, and demand different kinds of compensation so long as a "rough parity between competitors" was maintained. But the City could not impose a host of compensation burdens on one competitor and none on the other. *Id.* at 20a-23a. The Second Circuit also held that all of the contested nonfee provisions of the franchise ordinance and proposal were invalid as not sufficiently related to management of the right-of-way. *Id.* at 23a-26a.

REASONS FOR DENYING THE PETITION

The City of White Plains has prohibited TCG from providing any telecommunications services in the City of White Plains and has imposed franchising requirements upon TCG that it does not apply to the incumbent monopoly provider Verizon. Those requirements include an exaction of 5% of the gross revenues of TCG and its affiliates (such as AT&T), which places TCG at a 5% pricing disadvantage in its competition with Verizon. Adopting the position urged by the FCC below as *amicus curiae*, the Second Circuit correctly held that the City's franchising requirements erected a barrier to entry preempted by section 253 of the Act. None of the grab bag of issues raised by the City is worthy of this Court's review. There are no conflicts of authority that can be resolved by review of the judgment below; this case is not the proper vehicle for decision of these issues in any event; and the City's position on the merits is flawed and foreclosed by the stipulated facts.

I. THERE IS NO CONFLICT ON THE STANDARD FOR PREEMPTION UNDER SECTION 253(a).

The City first claims that this Court should review the standard for preemption under 253(a) because the statutory

language (like many of the provisions of the 1996 Act) is ambiguous. Pet. 14-17; cf. *AT&T Corp.*, 525 U.S. at 397 ("It would be a gross understatement to say that the 1996 Act is not a model of clarity"). But there is no conflict of authority on the standard adopted by the Second Circuit, which is also the standard announced by the FCC. Pet. App. 15a. Certainly no court of appeals has adopted the extreme and unsupportable position urged by the City, namely, that section 253(a) only preempts state or local legal requirements that absolutely and unconditionally "prohibit competitors from operating in the City." Pet. 9. This Court does not grant certiorari simply because a "case offers the opportunity to analyze Section 253 and to instruct the lower courts in its proper application." *Id.* at 17. On this issue, the City presents nothing more than an insubstantial and factbound claim.

Section 253 forbids any state or local legal requirement that "*may* prohibit or have the *effect* of prohibiting *the ability* of any entity to *provide any* interstate or intrastate telecommunications service." 47 U.S.C. § 253(a) (emphasis added). The language of "may have the effect of prohibiting" a carrier's "ability" to provide any service is not crystalline in its clarity, as many courts have remarked. See, *e.g.*, *City of Abilene, Tex.* v. *FCC*, 164 F.3d 49, 52 (D.C. Cir. 1999). But the City's reading of the statute – that only state and local laws that absolutely prohibit a carrier from entering a market – is not consistent with that text, much less compelled by it. First, the statute, by its use of the phrase "may have the effect," looks to potential effects, not just actual prohibitions. Second, section 253(a) covers the potential prohibitory effects on a carrier's "ability" to provide "any" telecommunication service. *See United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning ...."). Section 253 cannot be reasonably read to outlaw only state and local legal requirements that make it impossible for a carrier to provide a telecommunications service to *all* potential customers of that service; any

requirements that deny a carrier the ability to compete effectively in a market are preempted under section 253(a) unless preserved by section 253(b) or (c).

The FCC has accordingly interpreted section 253(a) to preempt not only outright prohibitions, but "legal barriers to entry" that "materially inhibit or limit the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *Texas Preemption Order*, at 3470, 3480 (¶¶ 22, 41). The Second Circuit adopted the FCC's interpretation. Pet. App. 15a. To the extent section 253(a) is ambiguous (as Petitioner concedes it is), the FCC is entitled to deference in interpreting section 253(a), which it enforces pursuant to section 253(d). See 47 U.S.C. § 253(d) (granting the Commission the power to preempt state laws or legal requirements that violate section 253(a)); *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-45 (1984).[2]

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[2] In a strained attempt to avoid *Chevron* deference, the City suggests that the Second Circuit did not adopt the FCC's standard. Pet. 19 n.20. That is simply false. The Second Circuit expressly quoted that standard as set forth in FCC orders, and held that "[w]e agree with these precedents." Pet. App. 15a. The Second Circuit then found that the Ordinance and the City's extensive delays in implementing that Ordinance in processing TCG's request for right-of-way access posed "obstacles ... to TCG's ability to compete in White Plains on a fair basis." *Id.* Contrary to the City's claims, the Second Circuit was applying and restating the FCC's "compete in a fair and balanced legal and regulatory environment" standard, not departing from it. Likewise wrong is the City's claim that the Second Circuit held that the FCC orders interpreting section 253(a) were "'not controlling.'" Pet. 19 n.20 (quoting Pet. App. 14a). The Second Circuit made that statement in regard to "FCC interpretations of the scope of section 253(c)," given ambiguity regarding the FCC's enforcement jurisdiction under that subsection. Pet. App. 14a. The Second Circuit never held that FCC orders interpreting section 253(a), which the FCC directly enforces, were not entitled to *Chevron* deference. Indeed, pursuant to its broad rulemaking powers under section 201(b) of the Act, the FCC is entitled to *Chevron* deference in its interpretation even

Moreover, the FCC's interpretation adopted by the Second Circuit is clearly correct and at a minimum a reasonable interpretation of the statute. The title of section 253 is entitled "Removal of barriers to entry." See *INS* v. *National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("the title of a statute or section can aid in resolving an ambiguity in the legislation's text"). The concept of barrier to entry is not limited to absolute prohibitions on entry, but encompasses any "factor in a market that makes the cost of doing business higher for a new entrant than it is for established firms." Herbert Hovenkamp, *Economics and Federal Antitrust Law* § 11.6, at 305 (1985); 2A Phillip E. Areeda et al., *Antitrust Law* ¶ 420, at 57-58 (2d ed. 2002). The legislative history likewise makes plain that section 253 "preempts almost all State and local barriers to competing with the telephone companies." S. Rep. No. 104-23, at 5, 35 (1995) (characterizing section 253(a) as "intended to remove barriers to competition"); 141 Cong. Rec. S7886, S7888-89 (daily ed. June 7, 1995) (remarks of Sen. Pressler, sponsor) (Act "[r]emoves virtually all legal barriers to competition"); *id.* S8306 (daily ed. June 14, 1995) (remarks of Sen. Gorton) (same). Indeed, this Court has interpreted section 253(a) to outlaw not only absolute prohibitions on entry, but any state or local law that "impedes the provision of 'telecommunications services.'" *Verizon*, 122 S. Ct. at 1662; *AT&T Corp.*, 525 U.S. at 371 (section 253(a) precludes states and localities from "enforc[ing] laws that impede competition"); 525 U.S. at 416 (Breyer, J., concurring in part and dissenting in part) (section 253(a) dismantles "legal barriers" that would "inhibit" entry).

Furthermore, the City's contrary position altogether disregards the Act's purpose of fostering local competition against incumbent monopolists. The City's argument is that Congress granted localities a nearly boundless authority to

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of those provisions of the Act it does not directly enforce. *AT&T Corp.*, 525 U.S. at 380, 386.

reduce a competitor's entry to a trickle so long as they do not plug the dike completely. Contrary to the City's claims (Pet. 18-20), the FCC and Second Circuit did not invoke statutory purpose to override the plain meaning of a statute. Rather, they simply recognized that a court interpreting a statute "'must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" *United States Nat'l Bank* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993). The overriding purpose of the 1996 Act informed the Second Circuit's reading of section 253's broad preemption of state or local requirements that may effectively prohibit the ability of "any entity to provide any interstate or intrastate telecommunications service."

The standard adopted by the FCC and the Second Circuit is thus plainly correct, and there is no split among the circuits on this point. The City implies that the Sixth Circuit rejects this standard, but that is not true. The Sixth Circuit found no violation of section 253(a) on the evidence presented in that case, but suggested that state or local laws that help one carrier "undercut its competition" and create "a barrier to entry by newcomers" may violate section 253(a). See *TCG Detroit* v. *City of Dearborn*, 206 F.3d 618, 625 (6th Cir. 2000). Although the Sixth Circuit (in TCG's view) erroneously applied this standard to the facts presented in that case, it did not directly reject the legal standard adopted by the FCC and the Second Circuit, and the Sixth Circuit (like every other court) did not adopt the City's position that section 253(a) only covers absolute exclusions from the market.

This case is also not the proper vehicle to test the validity of the FCC standard. This is not a case where the legal requirements at issue simply favor one competitor over another. Here, the City in fact prohibited TCG from providing telecommunications services in White Plains. The Ordinance flatly provides that "[n]o person shall use or

occupy the streets as a telecommunications provider" without a franchise or revocable license. Pet. App. 5b. Insisting upon onerous and discriminatory terms in the August Proposal, and exercising its absolute discretion to delay and deny entry, the City blocked TCG from providing service in White Plains.

Thus, even if the FCC standard were not so indubitably correct, the City's legal requirements squarely violate the textual command of section 253(a) because by any lights they "have the effect of prohibiting" TCG from being able to provide telecommunications service in White Plains. The City implausibly asks this Court in effect to rewrite the statute to preempt only legal requirements that "have the effect of *unconditionally and absolutely* prohibiting" a carrier from providing service. Not only is the City's position inconsistent with the statute, but the FCC has also rejected the City's interpretation, holding, in an order affirmed by the Tenth Circuit, that section 253(a) forbids entry barriers regardless of whether they are "'absolute'" or "'conditional.'" *Silver Star Telephone Co.*, 13 F.C.C.R. 16356, 16360 (¶ 8) (1998), *aff'd*, 201 F.3d 1264, 1268 (10th Cir. 2000); see Pet. App. 15a (noting Second Circuit's agreement with the Tenth Circuit).

The City points again to the Sixth Circuit's holding in *Dearborn* that a conditional prohibition on the provision of service without a franchise is not, without more, a violation of section 253(a). Although the Sixth Circuit was wrong on that point, see, *e.g.*, *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602, 628-29 (1974) (laws requiring governmental approval prior to entry are classic "regulatory barriers to entry"); 2A Areeda, *supra*, ¶ 421h, its rule is not implicated on these facts. The Second Circuit relied not simply on the prohibitory clause of the Ordinance, but on the broad and unlawful discretion the Ordinance otherwise grants city officials, the demands reflected in the City's August Proposal, and the City's "extensive delays" in processing TCG's request for right-of-way access. Pet. App. 15a. The City asks this Court to revisit the facts of this case and find no delays,

Pet. 18-19, but there is no reason this Court would wish to undertake such a factbound inquiry that has no importance outside this case.

In short, the City's first issue is factbound, is clearly wrong on the merits, presents no conflict in the circuits, and is thus not remotely worthy of review.

II. THERE IS NO CONFLICT ON WHETHER THE PROHIBITORY EFFECT OF THE ORDINANCE AS A WHOLE MAY BE CONSIDERED.

The City also challenges the Second Circuit's conclusion that it should consider the effect of the Ordinance as a whole in determining whether it creates a barrier to entry subject to preemption under section 253(a). Pet. App. 15a-16a. There are manifold reasons for the Court to deny certiorari on this issue as well.

First, the City alleges no conflict of authority on this point.

Second, the Second Circuit found that the City had waived any objection to this approach because "the district court applied this methodology and neither party objected." Pet. App. 16a. The City counters that there was a single sentence in its opening brief on appeal – and that is all it was – that declares that *certain* of the *nonfee* provisions at issue "'do not even arguably prevent from TCG from offering service under Section 253(a).'" Pet. 22 n.22. That argument is unresponsive to the issue of waiver before the *district court*, and indeed effectively concedes waiver. Moreover, waiver aside, there is no reason this Court should reach out to review an issue that was not fully briefed to the court of appeals.

Third, as noted above, the Second Circuit did not rely solely on the terms of the Ordinance in finding a violation of section 253(a); it also relied on the terms of the August Proposal and on the City's extensive delays under the auspices of the Ordinance in acting upon TCG's request for

access. Pet. App. 15a. Thus, resolution of the issue presented would not exonerate the City.

Fourth, the City's position is meritless. As the Second Circuit points out, "applying § 253(a) to individual provisions without considering the Ordinance as a whole would neglect the possibility that a town could effectively prohibit telecommunications services through a combination of individually non-objectionable provisions." Pet. App. 16a. Congress was concerned about the practical effect of state and municipal regulation on the competitive provision of telecommunications service, and nothing in the text or policy of the Act suggests that Congress excluded from preemption state and local regulations that as a whole defeat competition. This issue is neither suitable for, nor worthy of, review.[3]

III. NO CONFLICT ON THE COMPETITIVE NEUTRALITY STANDARD IS PRESENTED BY THE JUDGMENT BELOW.

The City next claims that the Second Circuit interpreted the competitive neutrality standard of section 253(c) to require "the City to [c]harge the [s]ame [f]ranchise [f]ees" to new entrants and incumbents, and that this case presents an opportunity to resolve a conflict between the Second and Sixth Circuits. Pet. 23. Neither claim is true.

The City here sought to charge a franchise fee of 5% of the gross revenues of TCG and its affiliates (including AT&T, a

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[3] The City argues that the Second Circuit's ruling on this point overrides the statutory phrase in section 253(c) that "[n]othing shall affect" municipal power to manage rights of way, 47 U.S.C. § 253(c). Pet. 24. That argument is wrong. The Second Circuit specifically held that even after the ordinance as a whole is analyzed under section 253(a), it would analyze whether individual provisions are saved by section 253(c) so as to avoid "improper infringement of the City's legitimate interests in regulating the uses of the public rights-of-way." Pet. App. 15a-16a. "Nothing" in the Second Circuit's application of section 253 does "affect" legitimate municipal authority under section 253(c).

long-distance carrier), as well as demanding certain minimum fees and in-kind compensation. Pet. App. 2d-4d. The City did not impose fees of any kind (or, indeed any franchising requirements) on Verizon. Instead, the City continued to have the use of space in Verizon conduit that had long ago been built and provided.

The Second Circuit had no trouble finding the City had failed to prove that its imposition of fees of this kind on a new entrant but not on the incumbent with which it competes was not "competitively neutral." Citing this Court's decision in *Verizon*, 122 S. Ct. at 1653-54, the Second Circuit recognized that only forward-looking costs, and not sunk costs, have economic relevance. Pet. 20a.[4] Verizon's expenditures to build the conduit years ago were sunk costs, and in any event Verizon was compensated for those expenditures over the years by its monopoly status and by the inclusion of those costs in its regulated rate base. *Id.*; Initial FCC Br. 16 (noting that presumably the historical costs of the conduit were included in the rate base and thus already reimbursed by ratepayers in traditional cost-of-service ratemaking). Moreover, because the franchise fee required TCG to turn over 5% of every dollar the company or its affiliates earned, it placed TCG at a structural pricing disadvantage in head-to-head competition with Verizon. The court rightly concluded that "Verizon will have the advantage of choosing to either

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[4] The term "forward-looking costs" refers to costs incurred on a going forward basis as output changes; thus, if a carrier subject to a 5% franchise fee produces services that it sells for $100, the $5 it pays to the municipality is a forward-looking cost because it is incurred with the provision of services. Verizon's past expenditure to build conduit is a sunk cost because it does not change with output. Because it is sunk, it is not economically relevant and Verizon does not take such cost into account in generating or pricing its telecommunications services. *See generally Implementation of the Local Competition Provisions of the Telecomms. Act of 1996*, 11 F.C.C.R. 15499, 15844-45 (¶ 675) (1996); *MCI Communications Corp.* v. *AT&T Co.*, 708 F.2d 1081, 1116-17 (7th Cir. 1983).

undercut TCG's prices or to improve its profit margin relative to TCG's profit margin," and that such skewed competition contravenes the Act. Pet. App. 21a. Indeed, this is the very result and analysis that the FCC urged in its *amicus* brief in this case and has adopted in its orders interpreting the Act's "competitive neutrality" requirements.[5]

The City makes a series of unsound arguments suggesting that the Second Circuit misinterpreted section 253(c). First, the City incorrectly argues that the Second Circuit effectively resurrected the "parity" provision of section 243 of H.R. 1555, which required that no different fees could be imposed on incumbent and nonincumbent carriers, and which was superseded by the current section 253. Pet. 25-27. But the Second Circuit made clear that "[t]he statute does not require precise parity of treatment," and that the City could impose different fees on different providers by taking into account "different uses of the rights-of-way," "[t]he scale of the use of rights-of-way," and the "costs incurred" by the municipality. Pet. App. 22a-23a.

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[5] The FCC noted that the imposition of incremental costs in the amount of 5% of gross revenues on TCG but not Verizon "inevitably puts TCG at a pricing disadvantage in relation to Verizon," and is not competitively neutral because it would "'give one service provider an appreciable, incremental cost advantage over another service provider when competing for a specific subscriber.'" Initial FCC Br. 16 (quoting *Telephone Number Portability*, 13 F.C.C.R. 11701, 11731-32 (¶ 53) (1998)). *See also, e.g., Federal-State Joint Bd. on Universal Serv.*, 12 F.C.C.R. 8776, 8888 (¶ 200) (1997) (costs of universal service must be borne equitably by all competitors); *Numbering Res. Optimization*, 15 F.C.C.R. 7574, 7596-98 (¶¶ 47-51) (2000). The City's claim that the FCC has no authority to interpret section 253(c) is meritless. *See supra* n.2. In any event, the term "competitively neutral" presumptively has the same meaning whenever it is used in the Act, *Sorenson* v. *Secretary of Treasury*, 475 U.S. 851, 860 (1986), and most assuredly does not have a different meaning in subsections 253(b) and (c). Even the City does not dispute that the FCC has the authority to interpret and enforce section 253(b), *see* 47 U.S.C. § 253(d), and thus the Commission's interpretation of "competitively neutral" must be given deference.

Second, contrary to the City's claim, the Second Circuit did not err in failing to remand the case for a determination of the value of the use of Verizon's existing conduit. As an initial matter, the value of the conduit is irrelevant; any fee structure that imposes forward-looking costs on the new entrant but not on the incumbent is by definition not competitively neutral. Pet. App. 22a-23a. Furthermore, it was the City's burden to prove the competitive neutrality of its fees under section 253(c) once TCG proved a violation of section 253(a), *New Jersey Payphone Ass'n* v. *Town of West New York*, 299 F.3d 235, 240 (3d Cir. 2002); *Texas Preemption Order* at 3463 (¶ 4); Pet. App. 40a n.5, and the City failed to adduce that proof.

Third, the Second Circuit did not err in failing to consider the alleged "regulatory compact" by which, according to the City, it granted Verizon access to its streets in return for a guarantee of universal service to its residents. Pet. 24-25. Not only does the record refute this claim of a regulatory compact, see *supra* at 8-9, but universal service can form no part of the analysis. As the FCC informed the court, universal service is an obligation imposed by (and funded under) state and federal law, not municipal agreements; thus, the Act exempts competitively neutral efforts of states (not municipalities) to preserve and advance universal service in section 253(b). Initial FCC Br. 17-18. Finally, municipal requirements to advance universal service would thwart the new universal service mechanisms that the FCC and the States are developing under the auspices of section 254 of the Act, which requires "specific and predictable mechanisms" for promoting universal service funded by "equitable and nondiscriminatory" contributions by all carriers, 47 U.S.C. § 254. Initial FCC Br. 18-19.

Not only is the City's attack on the ruling below meritless, but this case does not present any conflict between the judgments of the Second and Sixth Circuits, as the City claims. It is true that the Second Circuit opined that the Sixth

Circuit's decision in "*TCG Detroit* was wrongly decided." Pet. App. 21a. *TCG Detroit* held that, where a municipality attempts to impose gross revenues fees on the incumbent but a court holds that the municipality is barred from doing so by state law, the imposition of such fees on a new entrant does not violate the competitive neutrality requirement of section 253(c). 206 F.3d at 624-25. The Second Circuit correctly concluded that this is wrong, for "§ 253 does not limit municipalities to charging fees that are 'competitively neutral' to the extent permitted by state law; it forbids fees that are not competitively neutral, period, without regard to the municipality's intent." Pet. App. 21a. The bar on discrimination is absolute.

But while the Second Circuit rejected the Sixth Circuit's construction of § 253, the Second Circuit noted that the facts presented in the two cases are not "precisely analogous," Pet. App. 21a, and thus there is no conflict between the *judgments* of the two circuits. The Sixth Circuit's decision in *TCG Dearborn* rested on its separate holding that a gross revenue assessment on the incumbent was barred by state law, and there is no indication that the Sixth Circuit would have reached a different result than did the Second Circuit in a case, as here, where such circumstances are not present. Similarly, affirmance of the Second Circuit's judgment would not resolve the conflict over whether gross revenues fees imposed only on the new entrant are competitively neutral when state law has been held to bar the city's attempted imposition of such fees on the incumbent. Review of the Second Circuit's invalidation of the patently discriminatory franchise fee in this case is wholly unwarranted.

IV. THE ISSUES REGARDING NONFEE PROVISIONS ARE NOT WORTHY OF REVIEW.

Finally, the City claims that the Second Circuit erred in invalidating two nonfee provisions: (1) a provision permitting City officials to approve or deny access to public rights-of-way on any basis they deem to be in "the public interest," and

(2) provisions giving the City the right to approve any transfer not only of the franchise but of the corporate control of TCG! See Pet. 27-31; Pet. App. 9b, 12b, 9d-12d. Once again, neither issue is remotely worthy of review for a host of reasons.

First, the City alleges no split of authority on these issues.

Second, the flaws in these provisions are tied to the specific provisions of this Ordinance and the August Proposal.

Third, even if the City were correct that the provisions were not inherently offensive, the City still would have violated the competitive neutrality requirement of section 253(c) because it did not impose them on Verizon. See Pet. App. 20a.

Fourth, the City's claims of error are farfetched. On the public interest standard, the Second Circuit did not apply "strict scrutiny," announce a general rule that the public interest standard is void for vagueness, or entertain facial due process challenges in contravention of *United States* v. *Salerno*, 481 U.S. 739 (1987), as the City imaginatively argues. Pet. 27-29. The Second Circuit simply applied section 253(c) according to its terms, and held that the City could only regulate access to public rights-of-way "to manage the public rights-of-way" and "to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis," 47 U.S.C. § 253(c). As the district court noted, other courts have likewise found such broad grants of discretion to exceed the bounds of section 253(c). Pet. App. 48a (citing cases). Federal law does not permit the City to deny or condition the access of telecommunications providers to public rights-of-way for any reason they deem to promote the public interest.

Similarly, the City's argument regarding the franchise and corporate control transfer provisions can be quickly dismissed. As an initial matter, the claims that this ruling endangers republican government under the Guaranty Claims,

commandeers local governments in violation of the Commerce Clause, and destroys the City's right to exclude others from public property in violation of the Fifth Amendment (Pet. 30-31) were never raised and thus never addressed below. That is evidenced by the City's filing in this Court for the first time a notice that the constitutionality of state and federal law would be drawn into question. In any case, the claims are meritless. The Second Circuit ruling does not deny cities the power to impose a franchise transfer restriction so long as, in line with section 253(c)'s command, it is "reasonably related to regulating the use of the rights-of-way" and is "applied neutrally to all franchises." Pet. 26a. Like the Ninth Circuit, *City of Auburn*, 260 F.3d at 1178, the Second Circuit simply struck down a transfer provision "of sweeping breadth" that arrogated to the municipalities the power to deny franchise transfers and corporate control transactions for any reason they please. Pet. 26a.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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